SUPREME COURT, U. S.

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FILED
OCT 2 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 369.

ISAAC TIKTIN, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

REPLY MEMORANDUM.

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In its Memorandum in Opposition the United States suggests that the Court may wish to defer disposition of the instant petition until after the Court has disposed of *Angelini* and *Mackey* (cases Nos. 5 and 36, this term).

Deferring a decision in *Tiktin* would not necessarily dispose of the questions raised herein. The instant case involves a criminal issue, whereas *Angelini* involves a civil issue. In *Mackey* the question involves an issue as to whether or not wagering tax returns should have been allowed to be introduced into evidence.

This Court has taken a position, in *Marchetti*, at page 52, wherein it stated:

> "It both centers attention upon the registrant as a gambler, and compels 'injurious disclosure[s]' which may provide or assist in the collection of evidence admissible in a prosecution for past or present offenses. These offenses need not include actual gambling; they might involve only the custody or transportation of gambling paraphernalia, or other preparations for future gambling. Further, the acquisi-

> tion of a federal gambling stamp, requiring as it does the declaration of a present intent to commence gambling activities, obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of *interstate* facilities for gambling purposes. See, e.g., *Acklen v. State,* 196 Tenn. 314, 267 S.W.2d 101." (Emphasis ours.)

In the instant case the Government used evidence which they seized under the guise of a search warrant. The Government's affidavit attached to their request for the search warrant, alleged that Tiktin had not been issued "a wagering occupational tax stamp." *The search warrant was issued because of the failure of the petitioner to purchase such wagering stamp.*

Petitioners believe that if a prosecution for other crimes may not lawfully be based upon a coerced waiver of a person's Fifth Amendment privilege, *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964), then such a prosecution may not lawfully be founded upon evidence which could not lawfully have been seized but for his assertion of the Fifth Amendment privilege.

In *Silbert v. United States,* 282 F. Supp. 635 (D. Md. 1968), the court had before it a problem concerning four defendants, namely:

1. Silbert
2. Salsbury
3. Kassap
4. Bondroff

Search warrants were issued in *Silbert* for all of the defendants. The search warrants issued for Silbert and Bondroff were similar to the extent that the Government claimed, among other things, that these two individuals were concealing certain gambling paraphernalia which

was used in violation of Federal Wagering Tax laws, namely, Sections 371 and 1952 Title 18 (U.S.C.).[1]

The warrants issued for Salsbury and Kassap did not include any allegations that violations of Sections 371 and 1952 existed.

The court held that items seized under the warrants in Salsbury and Kassap must be returned. The court held that this conclusion did not rest on the Fourth Amendment grounds but on the Fifth Amendment privilege.

The court went on to state:

> "If any other conclusion is reached, Salsbury and Kassap will still be confronted with Maryland, and possibly *other federal prosecutions* which are based on evidence seized pursuant to warrants issued *solely* for alleged violations of the federal wagering tax provisions—evidence which could not have been obtained under such warrants if Salsbury and Kassap had not chosen to avoid incriminating themselves by failing to comply with the federal wagering tax law requirements." (Emphasis supplied.)

The Government cited, in their Brief before the Sixth Circuit, *Washington v. United States,* 402 F.2d 3 (4th Cir. 1968) as cutting the ground out from under *Silbert* and as support for its position in the instant case. However, here again the Government reiterates its position that *Grosso* and *Marchetti* do not invalidate evidence seized and later used for *civil* tax purposes.

The two questions presented in *Washington* were: "(1) Whether the judgment against Othello Washington, based on the 10 per cent wagering excise tax should be set aside because of the decisions of the Supreme Court in the *Grosso* and *Marchetti* cases; and (2) whether in this

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[1] Sections 371 and 1952 are the same sections involved in the instant case. Sections 371 and 1952 deal with conspiracy and interstate violations.

action by the United States to enforce a federal tax lien (with respect to real estate), the trial court erred in ordering the sale of the real estate belonging to taxpayer free of the inchoate dower interest of taxpayer's wife." It was only by way of dictum that the court in *Washington* did comment as the Government suggests on page 10 of its Brief. However, the court continued in its comments beyond those comments included in the Government's Brief. The court went on to comment:

> "Under the circumstances, we conclude that where, as here, there exists probably cause for belief that an offense has been committed (which appellants conceded), a valid search warrant may issue *even though the Government may be unable to convict the defendant if he properly raises his claim of privilege against self-incrimination.* We hold that the judgment for wagering excise tax deficiencies rests upon a valid assessment and will be affirmed." (Emphasis supplied.)

The *Washington* case clearly covers only a *civil* question. It might be interesting to note the footnotes, on page 6 of the *Washington* case, which state:

> "In the instant case taxpayer, Othello Washington, *did not raise the privilege against self-incrimination in the court below.* It is true that in one of the two criminal cases which followed the search and seizure *he moved to suppress the evidence obtained under the warrant on grounds other than self-incrimination. After that motion was denied he entered a plea of guilty* in the related criminal case and was sentenced to imprisonment." (Emphasis supplied.)

The *Washington* case has little or nothing in common with the instant case. In the *Washington* case the defendant did not claim a privilege against self-incrimination, the evidence seized in the raid was introduced into evidence in the criminal, without objection by defendant, and

defendant pled guilty to the criminal charge. The defendant then asked the court, in the *civil* case, to suppress the same evidence.

In the instant case, defendant did claim the privilege against self-incrimination, the District Court did order the evidence suppressed and last, but not least, the instant case involves a *criminal* question and not a *civil* question as does *Washington.*

The *Silbert* case is directly on point with the instant case. In *Tiktin,* in the affidavit attached to the request for a search warrant, no mention was made of conspiracy nor interstate violations, the very cause for which Tiktin was indicted.

The petitioner herein has discovered, since filing his Petition For a Writ of Certiorari, in the instant case, that *Hanon* (presently being considered by this Court, Case No. 358, this Term) has been overruled, in a rehearing en banc. However, the same two judges who ruled in favor of *Hanon* originally did uphold their same position in favor of *Hanon,* and dissented to the opinion rendered in the rehearing.

Finally, the instant case raises a question not raised by any of the cases currently pending before this Court. That question of whether or not the Notice of Appeal, by the Government, should be considered valid, wherein the Government fails to follow the procedure, outlined in the Omnibus Crime Control and Safe Streets Act of 1968, which allows for an appeal in these cases.

Prior to the Omnibus Crime Control and Safe Streets Act of 1968 no appeal was available to the Government. The "Act" provided a procedure to follow if an appeal was made. It now comes down to the question of whether or not the Government must follow the "Act," as outlined, or can they appeal from lower court decisions and ignore the procedure as outlined in the "Act."

The Government filed a "Notice to Appeal," recognized their error and attempted to correct it by their "Amended Notice of Appeal." However, in the amended notice the Government cited only one of the two requirements that the "Act stated must be cited. The Government *failed to cite* that the Appeal *was not taken for the purpose of delay.*" (Emphasis ours.)

For years, appeals in narcotics cases have been possible wherein the Government cites as their reason for appeal, only the requirement as cited in 18 U.S.C. 1404(3). Motion to suppress appeal by the United States, which states "* * * this section *shall not apply* with respect to any such motion *unless the United States attorney shall certify,* to the judge granting such motion, *that the appeal is not taken for purposes of delay.*" (Emphasis ours.)

For the reasons stated, the petition should be granted and the decision of this Court would once and for all clarify, for the lower courts, any misunderstanding of this Court's position insofar as *Marchetti* and *Grosso* are concerned, especially where it relates to criminal cases.

Respectfully submitted,

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